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THE "LEVY ELECTION LAW" OF 1911 IN NEW YORK

THE chief feature of the so-called "Levy Election Law,"¹ adopted by the New York legislature in 1911, was its attempt, by jockeying the form of the party-column ballot, to throw obstacles in the way of the independent voter and to make effective fusion between minority parties and independent political groups practically impossible. The unanimous decision of the Court of Appeals in the *Matter of Hopper*,² rendered October 10, 1911, holding the ballot provisions of this law unconstitutional, is a notable triumph of the democratic principle over the oligarchic interests of a political machine.

In order fully to understand the character of this legislation and the scope and significance of the decision, the student of electoral methods should know something of previous efforts toward the same end on the part of dominant political machines in other states, and of the attitude which the courts in those jurisdictions have taken with respect to such efforts.

Michigan, in 1895, Ohio, in 1896, and Wisconsin, in 1897, passed statutes providing, in conjunction with the party-column form of ballot, that the name of no candidate should appear upon the ballot in more than one place. The Michigan and Ohio statutes further provided that, in case any candidate should receive a nomination from more than one party, he must elect in which ticket on the ballot his name should appear. In Wisconsin his name was to appear in the ticket of the party first nominating him. In any one of these three states, accordingly, the candidate might take or leave either nomination, but could not enjoy the practical advantages of both. The necessary result of such a limitation, where the party-column type of ballot is in use, as it was (and still is) in the three states named, is to hamper fusion between parties upon candidates, and to prevent the offering of eclectic tickets by municipal parties or independent political bodies. Other restrictions that result

¹ Laws 1911, ch. 649.

² 203 N. Y. 144.

from such a rule will be mentioned later, when the New York variant of this scheme is examined. In spite of attack upon these provisions they were held valid by the courts in each of the three states.¹ The decisions upholding these statutes were rendered in 1895, 1896 and 1898 respectively, *i. e.* immediately after their enactment and before their practical effect had been tested. It should be set down to the credit of Ohio that this vicious provision has since been repealed, but it is still operative in the two other states.

In 1899 California adopted a similar statute; and in 1902—some years, it will be noticed, after the other cases had been decided, and therefore at a time when it had become possible to determine the practical effects of the provisions in question—the same question was presented to the Supreme Court of California. After a very careful consideration of the Michigan, Ohio and Wisconsin cases, the California court, dividing four judges to three, came to the opposite conclusion and declared such a provision unconstitutional.² The majority of the judges attached considerable weight to the argument that, in the column on the ballot from which a candidate's name was excluded by operation of the above rule, the California statute required the words "no nomination" to appear under the title of the office affected and that, inasmuch as the party in question had in fact made a nomination, the law required that a misrepresentation be made to the voters. As will appear later, the framers of the New York statute invented a device to meet this obviously serious criticism.

Turning for a moment from the legal side of this discussion to the political, let me point out to those not familiar with recent New York politics the circumstances which explain Tammany's attempt to take a leaf out of the Michigan statute book.

Mr. Edward R. Finch, to whom New York is largely indebted for the "signature law" of 1908 (requiring a voter to sign his name in the books kept by the election officers, first when he registers for the election and again when he casts his ballot

¹ *Todd v. Election Commissioners*, 104 Michigan, 474; *State v. Bode*, 55 Ohio State, 224; *State v. Anderson*, 100 Wisconsin, 523.

² *Murphy v. Curry*, 137 California, 479.

upon election day), claims that the effect of that law has been to cut down the fraudulent vote in New York City by not less than 30,000.¹ Besides this, a growing independence on the part of voters in New York City, together with other influences, has had its effect upon the "normal" machine vote. Whatever the reasons may be, the city election of 1909, from which (owing to the fusion of the Republican and Independence League parties upon a common city ticket, excepting only the office of mayor) Tammany emerged with a mayor but without any of the other city officers, even losing the borough presidency in its own stronghold, Manhattan, forced Tammany to take serious thought for the morrow. The Democratic wave of the following year swept that party into undisputed control of the New York legislature and made the New York City organization the dominant factor in the session of 1911. A Democratic governor, also carried in by the same wave, whose chief desire seemed to be that of preserving outward harmony in his party, completed the stage-setting for a legislative drama moving to the appropriate and foreordained dénouement.

It was under these favorable political auspices that the dominant party in the New York legislature addressed itself, in 1911, to the task of putting a hobble on fusion and the independent voter. In endeavoring to utilize the Michigan plan, however, it was confronted, as we have already seen, by differences of opinion in the courts of last resort of the central and Pacific states upon the question of the constitutionality of any such discriminatory provisions; and the latest and best considered case was adverse. Worse than that, a somewhat similar question had been presented to the New York Court of Appeals in 1910, and here also the decision was adverse.² In the Callahan case the provision held to be unconstitutional prohibited (under circumstances which it is unnecessary to state in detail) the nomination of the candidate of one party by another party. A majority of the court agreed with Chief Justice Cullen in holding that a party or independent political body had the right "to nom-

¹ "The Fight for a Clean Ballot." *The Independent*, May 12, 1910.

² Matter of Callahan, 200 N. Y. 59.

inate as its candidate any person who is qualified for the office," and that the legislature could not prevent the nomination of a candidate simply upon the ground that he had been already nominated by another party.

The electors have the right to vote for whom they will for public office, and this right cannot be denied them by legislation. Equally, any body of electors has the right to choose whom it will for its candidate for office and to appeal to the whole electorate for votes in his behalf.

It was obvious then that no restriction which would have the effect of prohibiting one party from nominating a candidate already nominated by another party would escape the condemnation of the Court of Appeals. It was almost equally certain, in view of the language and spirit of the Callahan decision, to say nothing of the decision in the California case, that no scheme which in effect would exclude a candidate's name from the column of any party nominating him and substitute the false statement "no nomination" would escape similar condemnation; and it would be only slightly less hopeless to attempt to exclude the name and leave the space wholly blank. Confronted with these very real difficulties, the legislative majority was constrained to invent some new device, which might in fact withhold while it wore the air of giving. The Levy Election Law accordingly provided that parties might freely nominate the candidates of other parties, but that the name of a candidate nominated by more than one party could appear but once on the ballot. Such a candidate must elect in which party-column his name should appear. So far this was like the old scheme. But the act went on to say that in the column or columns of the other party or parties, instead of the candidate's name, should appear a cross-reference, in the words "see Republican column," or "see Democratic column" *etc.*, as the case might be. It was further provided that, while each "political party" (*i. e.* each political organization that had cast 10,000 votes for governor in the last preceding gubernatorial election) should always have its separate column upon the ballot with its emblem and party circle at the top (even though it had not a single candidate who was not also the candidate of some other party,

in which case its column would contain nothing but cross-references), an "independent body" (*e. g.* a municipal party or any other political organization not running a candidate for governor and casting 10,000 votes for such candidate), in case of *complete* fusion, should have no place upon the ballot, but should be represented merely by its miniature emblem placed before the names of such candidates as it might endorse, with nothing elsewhere upon the ballot to indicate to what organization such emblem belonged. Upon the day of the argument of the Hopper case in the Court of Appeals, the legislature, in a vain effort to meet some of the criticisms directed against the Levy law, rushed through a bill embodying one or two minor amendments. One of these eleventh-hour amendments provided that large emblems, with the names of such independent bodies as had no separate columns, should be printed upon the ballot stub, in order that the ballot might indicate upon its face, by way of a marginal note, to what bodies the miniature emblems belonged. These amendments did not substantially affect the character of the measure, and they did not save it.

It should further be noted that this statute not only prohibited all but one of several fusing parties from printing their candidates' names upon their tickets, but also expressly provided that a cross-mark in the circle at the head of any party column should operate as a vote for those candidates only whose names were printed in that column, and not as a vote for the candidates designated by cross-references to other columns.

It requires little practical political experience or study of ballot laws to see that these provisions would affect adversely only parties desirous of fusing against a common enemy, and that they would put obstructions chiefly in the path of the independent and discriminating voter who might wish to split his ballot. More closely analyzed, they would have the following results:

(1) A party nominating the candidate or candidates of another party appears in the field on election day with a maimed and incomplete ticket. This impairs the party's prestige and consequently the chances of its other candidates. It is well known that a partial ticket does not receive the same consideration from the voters that a full ticket does.

(2) The voter is denied the right to indicate his support of his party's candidates *as such*, and he is driven either to forego supporting them or else to indicate his support of them as the candidates of another party, sometimes of a party he intensely dislikes. It is well known that many voters, if dissatisfied with their own party or with its management or with some policy or candidate, stay at home and refuse to vote rather than go to the polls and vote for the candidate of another party. It is clear that such voters would be unwilling to vote for a candidate who was primarily designated as the candidate of another party, although they would vote for him if his name appeared in the column of their own party. Such an attitude of mind may be regarded as unreasonable, but it is common, and the innocent candidate affected by it is entitled to sympathy.

(3) The fusion voter is denied the privilege accorded to other voters of voting for all the candidates of his party by a single mark (we are dealing, it must be remembered, with the party-column type of ballot) and is compelled to search through a complicated ballot for a large number of candidates. To vote a complete ticket he may be compelled to make a large number of voting-marks, depending upon the extent to which fusion has taken place and the consequent number of cross-references appearing in the column of his own party. For example: had this form of ballot been in use in New York City in 1909, a member of the Civic Alliance¹ would have had to make sixteen separate marks in order to vote his party's complete ticket, unless he was willing to adopt the alternative of putting a cross in the Republican party-circle and of making a small number of crosses in his own column for candidates on whom there was no fusion. There would have been absolutely no way in which a voter could have voted the Civic Alliance ticket "straight," *i. e.* by a single cross-mark. A Democratic voter, on the other hand, would have been able to vote his entire ticket "straight" by a single mark.

(4) As the Levy law was passed, and as it stood on the

¹ This was the Independence League or Hearst party under another name. The new name was adopted because the Independence League primaries had been captured by Tammany prior to the election.

statute book up to the day on which the question of its constitutionality was argued in the Court of Appeals, a political party fusing upon the office of governor faced a possible loss of its existence as a political party. This seems an extraordinary statement; but that this effect was no academic and remote possibility is illustrated by the political situation in New York state in 1906. In that year the Democratic party nominated William R. Hearst for governor; so did the Independence League. Suppose the Levy law had then been in effect. Also suppose that Mr. Hearst had elected to have his name appear on the ballot in the column of the Democratic party. From election day on, the Independence League would have lost its status as a "political party," making nominations by convention like other "political parties," and would have become an "independent body," making nominations by petition; because there would have been no way for it to poll 10,000 votes for its candidate for governor. All the votes for Mr. Hearst would have been cast for him as the Democratic candidate. Suppose, on the other hand, that Mr. Hearst, being primarily the candidate of the Independence League, had elected to appear in the column of that party; the boot would have been on the other leg, and the Democratic party would have lost its status. Of course, as a practical matter, under such circumstances no such fusion would have taken place; but this is only to seize the other horn of the dilemma and to admit that the practical effect of the law would be to prevent parties from nominating such persons as they please, and that is the very thing the Court of Appeals declared unconstitutional in the Callahan case.

Among the amendments, already referred to, that were hurried through the legislature on the day on which the Hopper case was argued in the Court of Appeals at Albany, was one which provided that 10,000 votes for *any* state officer might be taken as qualifying a "political party." This amendment left parties free to fuse on the office of governor. It is quite evident, however, that it did not do away with the difficulty which we are considering; it simply transferred it from the office of governor to the state ticket as an entirety. Under the amendment, *some* office must be excepted by a political party arranging a fusion.

The party might elect which office it would except, but some exception there must be. It is obvious that this device did not meet the constitutional objection.

In considering the constitutional question raised by the Levy law, as in considering the propriety of that measure from a political or legislative point of view, the historical line of approach seems helpful.

The party columns on an official blanket ballot are merely the successors of and substitutes for the separate unofficial party tickets formerly in use but now abolished. Formerly, when the ballots were physically the separate tickets of the various political organizations, when each party, faction or organization printed and distributed its own ticket to be used as a ballot, no one had the temerity even to suggest that parties A and B might be allowed to print their tickets and distribute them among the voters, but that organization C might be prohibited from so doing. Any such law would obviously have been unconstitutional. But in what way does the device of setting the separate tickets of the various political organizations edge to edge and printing them on a single piece of paper, for the purpose of safeguarding the election against fraudulent ballots, change the essential character of the separate tickets? To the writer it seems obvious that, so long as the party-column type of ballot is prescribed, the legislature can no more substitute for the name of a candidate upon the ticket of any political organization a direction to the voter to "see such and such a column," than in the days of the separate-party-ballot system it could have said to a political organization: "You can provide ballots with the names of fifty per cent of your candidates thereon, but if anybody wishes to vote for the other fifty per cent they must use the ballots of such and such another party." There is, indeed, a proper way of providing that the name of a fusion candidate shall appear but once upon the ballot, and that is by abolishing party columns and grouping the names of all the candidates for each office under the title of the office, the name of each candidate being followed by the names of the several parties nominating him. This method has been employed in Massachusetts for more than twenty years, and it is now in use

in fourteen other states.¹ But it would seem elementary that, so long as the party column is retained, its use ought not to be permitted to one organization and prohibited or restricted in the case of another.

The opponents of the Levy law made no claim that under the New York constitution the voter is guaranteed the opportunity of voting in such manner as will express his support of certain political principles, or that he must be accorded the opportunity of voting for all the candidates of his party by a single cross-mark, or that he must be able to ascertain from the ballot itself who are the candidates of his own party, so that he may vote for them as such and because they are such, or that the constitution prescribes in effect any particular form of ballot. On the contrary, the opponents of this statute admitted that these were matters within the discretion of the legislature. But what they did claim was that, if these rights were given to one party or political body, they could not be withheld from others. The criticism was not that the law unwisely regulated the form of the ballot, but that such regulations as it imposed were discriminatory, affecting different political organizations unequally and not permitting them to compete on the same basis at the polls.

In the court of first instance (the supreme court at special term) Justice Gavegan of New York county held the ballot provisions of the Levy Election Law unconstitutional, saying:

The right to merely nominate is empty and ineffective unless the act of a convention or of those nominating by petition be followed by compliance with other provisions of the Election Law and be reduced to the form of an official ballot to be submitted to the electors.

¹ New Jersey and California joined the "Massachusetts" or "office-group" ballot states in 1911. The others are Arkansas, Florida, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, Oregon, Tennessee (application of law restricted) and Virginia; also Colorado, Nebraska and Pennsylvania, where the system has an undesirable "straight-vote" rider. For an admirable digest and comparative statement of the ballot laws of all the states, from the introduction of the Australian form of ballot into this country down to and including the year 1910, see Arthur C. Ludington, *American Ballot Laws, 1888-1910*, published by the University of the State of New York as Education Department Bulletin no. 488 (February 1, 1911), also known as New York State Library Bulletin, Legislation, no. 40.

The case was appealed to the appellate division; and there, by a divided court (four justices to one) the decision of Justice Gavegan was reversed. Presiding Justice Ingraham, who wrote the opinion of the court, held that the provisions of the law alleged to be unconstitutional were a mere regulation of the form of the ballot and not an obstruction to or interference with the right of the voter of which the court would take notice. He seemed to think that so long as a voter was not "prevented from voting for any candidate for office" his rights were in no way "restricted," no matter what dissimilar and superior privileges might be accorded to other voters; and he supported his conclusions with the following argument:

It certainly cannot be assumed that the electors are so little concerned with the persons whom they desire to elect to office that they will not take the trouble to look through the ballot and pick out the names of the candidates for whom they desire to vote.

This might possibly pass for a good reason in Utopia, but it hardly meets the charge of discrimination between different political organizations and the electors composing them in New York. Indeed, Justice Ingraham's assumption is quite contrary to fact; and that the entire electorate is not made up of such paragons of civic intelligence as the learned justice seems willing to assume is known to every citizen outside a court room. Were proof needed, it abounds in election statistics. Two examples may be drawn from recent New York city elections.

Reference has been made above to the capture of the Independence League primaries by Tammany in 1909. One of the consequences (omitting the details which would explain this absurdity) was that the nominal Independence League appeared as usual upon the ballot, but with the words "no nomination" printed under the title of every office in its party-column, while the real Independence League party had another column on the ballot, under the new name of "Civic Alliance," with a new and different emblem to distinguish it. Notwithstanding these facts and the notoriety given to the whole situation by the press, 14,000 straight ballots were cast in the city for the empty ticket of the Independence League. In spite of everything, 14,000

voters made their crosses in the party circle of a ticket which contained not a single nomination.

In 1905, it will be remembered, William Travers Jerome, having been refused a renomination to the office of district attorney in New York county by Tammany, ran as an independent candidate. Mr. Jerome had a large following, and the contest was regarded as a battle against "boss rule." Shortly before election day, but after the time allowed by the election law for a candidate to decline a nomination had expired and after the printing of the ballots had begun, public opinion forced Mr. Flammer, the Republican candidate for the same office, to withdraw, in order that Mr. Jerome might be adopted by the Republicans as their candidate. But it was too late to change the ballot. In spite of the wide publicity given to the facts and the great public interest aroused by the situation, Mr. Flammer, though no longer a candidate, received in New York county 13,000 useless votes.

If under such circumstances thousands of voters throw away their votes, what would they do with a ballot full of cross-references to other columns, through which the average voter might wander searching for his candidates only to abandon the quest in despair? What a pit-fall for the unwary! Either this, or the ineffective straight vote in the circle of a minority party!

Let us, however, develop the argument a little further and see what a more general experience shows. It is a well attested fact that an apparently slight difference in the rules for marking the ballot will produce in practice a very marked difference in the actual vote cast. In 1906 the late Philip Loring Allen¹ demonstrated by abundant and carefully analyzed statistics that very slight differences in the methods prescribed for voting a split ticket in different groups of states produced remarkable differences in the extent to which the voters split their tickets. He chose five such groups of states. In the first group split-ticket voting was as easy as straight-ticket voting, for in either case the name of each candidate voted for had to be separately marked. In the second group, a straight ticket could be voted

¹ "Ballot Laws and their Workings." *POLITICAL SCIENCE QUARTERLY*, vol. xxi, pp. 38-58.

by means of a single cross-mark, while for each candidate not on the party ticket an additional cross-mark had to be made elsewhere, as under the present law in New York. In the third group, a straight ticket could be voted by means of a single cross-mark, while for each candidate not on the party ticket not only must a cross-mark be made elsewhere on the ballot but the name of the corresponding candidate on the party ticket must be erased. In the fourth group, a straight ticket could be voted by means of a single cross-mark or by a line drawn through each of the other columns, but to vote for a candidate not on a party ticket his name had to be written or pasted in the party column. In the fifth group, a straight ticket could be voted by means of a single cross-mark, but to vote a split ticket the name of each candidate had to be marked separately. According to Mr. Justice Ingraham's theoretical criterion, the difference in difficulty between these various methods prescribed for voting a split ticket would seem almost negligible. In practice, however, as Mr. Allen shows by an analysis of the returns from the general election of 1904, the average percentage of split-ticket voting in each of the above groups (based on the difference between the largest vote and the smallest vote received by different candidates of any one party) was 18.11 per cent in the first group, 7.30 per cent in the second, 8.48 per cent in the third, 4.39 per cent in the fourth and 4.85 per cent in the fifth. A selection of other bases for computing the percentage of split-ticket voting yielded even larger differences between the different groups, the greatest difference being between 19.08 per cent in the first group and 3.88 per cent in the fifth.

Experience demonstrates in other fields the operation of the same principle.

It is a psychological fact, well known and painstakingly acted upon in the business world, that a very slight difference in the amount of labor required in cases where large numbers of persons are concerned may mean an immense difference in the actual result secured. For example, in advertising or in the sending out of appeals for information or for money, the least apparent difference in the amount of concentration required to read an advertisement, or in the amount of energy required to indicate answers to a set of submitted questions and return

these answers to the sender, or in the effort required to send money by one process rather than by another, may, as any practical man well knows, spell all the difference between success and failure. If this fact is so well recognized in the business world, must it not also hold true where masses of voters are asked to indicate their wishes on a printed ballot?

A varying amount of actual labor as between the different processes by which masses of persons are required to act is not the only cause of marked differences in result. Another fertile cause of such resulting difference is an initial difference between simplicity of method on the one hand and complexity on the other. Small differences in the make-up of railroad time tables mean immense differences in the convenience of the traveling public. The same is true of the methods for recording purchases prescribed for clerks in department stores, of the forms provided by the post office for making out money orders, of the instructions to users of a pay-station telephone *etc.* In all such cases an extreme of clearness and simplicity, which from an *a priori* theoretical point of view would seem unnecessary, has been found in practice to be absolutely essential, and even the slightest increase in the complexity in the rules is known to cause an enormous increase in the amount of confusion and mistakes, or of inaction due to fear of mistakes.¹

It is idle to say that such considerations do not apply to the voter and his ballot. Increase the complexity of the rules of marking ever so slightly, and, no matter how clearly such changes may seem to have been explained to the voters, you invariably multiply, apparently out of all proportion to the difficulties you have created, the number of ballots rendered void or inoperative because of mistakes in marking. What is really more disastrous to the state, you prevent the voters from doing what they would otherwise do, were there a simpler way to do it.

If we look at the facts, and not at some theory of what they ought to be, we shall see that the discriminations between voters of different classes which the Levy law created amounted to a very substantial infringement of the equal rights of voters belonging to parties or independent bodies that were united in a fusion movement.

¹ Quoted by permission from an unpublished manuscript of Mr. Ludington, author of the monograph cited *supra*, p. 44, note.

The Court of Appeals did not ignore these practical considerations. It judged the intent and character of the statute according to the effects which it was sure to produce. Without a dissenting voice the court held the discriminations in question to be "of a very substantial character" and the act unconstitutional. From henceforth all citizens, including bosses and legislative puppets, must take notice that the constitution of New York requires "that every elector shall have the right to cast his vote without unnecessary discrimination against him as to the manner of casting his vote"; "that each voter shall have the same facilities as any other voter in expressing his will at the ballot-box, so far as practicable"; that,

while the constitution does not guarantee that the elector shall be allowed to express his vote by a single mark, he is guaranteed the right to express his will by a single mark if other voters are given the right to express theirs by a single mark and there is no difficulty in according the right to all;

that "inequality in the facilities afforded the electors in casting their votes may defeat the will of the people as thoroughly as restrictions which the courts would hold to operate as a disfranchisement of voters"; that the fact that "many coalitions between various bodies of electors are corrupt and criminal" does not give the legislature the right to forbid all coalitions, "or indirectly effect the same thing by rendering it more difficult to vote for a coalition nominee"; that, on the contrary,

the liberty of the electors in the exercise of the right vested in them by the constitution to choose public officers on whatever principle or dictated by whatever motive they see fit, unless those motives contravene common morality and are therefore criminal, such as bribery, violence, intimidation or fraud, cannot be denied.

The provisions of the New York constitution which the Levy law was held to violate are not specific; they are of the most general tenor. Article 1, section 1, provides: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." The court held it

to be a necessary implication from this provision, coupled with the other general provisions giving qualified citizens the right to vote, that the opportunities to vote accorded by the legislature should not be unequal. The court said :

Necessarily in all constitutions or other instruments there are certain propositions which the instruments import, as well as those they express and in terms assert. Therefore it is well settled that legislation contravening what the constitution necessarily implies is void equally with legislation contravening its express commands. . . . It is therefore clear that the otherwise plenary power granted to the legislature to prescribe the method of conducting elections cannot be so exercised as to disfranchise constitutionally qualified electors, and any system of election that unnecessarily prevents the elector from voting or from voting for the candidate of his choice violates the constitution. We think the constitutional provisions recited and the provisions that certain officers shall be chosen by the electors necessarily further imply that every elector shall have the right to cast his vote with equal facility to that afforded to other voters, or, to speak more accurately, without unnecessary discrimination against him as to the manner of casting his vote.

Referring to the contrary decisions in Michigan, Ohio and Wisconsin, and to the argument that the sole constitutional right guaranteed to the voter was " a reasonable opportunity to vote," the court said :

With great deference to the learned court from which we have quoted, in our opinion the constitution, by providing that certain officers shall be chosen by the electors, does guarantee that each voter shall have the same facilities as any other voter in expressing his will at the ballot-box so far as practicable. Any other principle, in our judgment, would be destructive of fair elections.

In illustration of the principle of implied guaranties, the court cited the well-recognized limitation upon the power of eminent domain. The constitution declares that " private property shall not be taken for public use without compensation." This is held to mean that private property shall not be taken for private use.

The effect of this New York decision may well be far reaching. Its assertion of the fundamental right of the individual voter and of groups of voters in political organizations based

upon whatever principle or principles they please (barring only criminal considerations) to a "square deal," including the right to compete at the polls upon equal terms with any other organization, however entrenched through power, popularity or tradition, will have its influence far beyond this state. Unlike the California decision, it is not bound up with and can not be held to be limited by any consideration of deliberate misstatement upon the face of the ballot. It is a clear and decisive affirmation that state constitutions are to be broadly construed, according to their spirit rather than according to their letter, in defence of the fundamental rights of voters. It furnishes an encouraging answer to those technical lawyers who are prone to exaggerate the difference between natural reason and what Coke called the "artificial reason" of the law, and who say, of a tricky bit of legislation: "It's a raw deal, as any judge can see on the golf links, but will he see it on the bench?"

The fundamental disloyalty of this type of legislation to our institutions puts the discussion of the subject quite outside the realm of party politics. Patriots of all parties may well unite in execration of such attempts. Their essential character is well summed up in the following words of a prominent speaker at one of the meetings of the last campaign, who described the statute as

a bold and defiant attempt to rob you of your political rights and liberties, and so to bind and gag you that you would be unable effectively to protest. If you do not rebuke such intolerable insolence you can hardly be said to deserve the liberties you have. To my mind an attempt to curtail the political rights and liberties of the citizens is the greatest treason that a republic can know.¹

It should not be implied from what has been said that the Levy law contained no meritorious or at least defensible provisions. The requirement of personal registration, heretofore operative in cities and in villages of 5000 inhabitants or over, was extended to the entire state. The "signature law," heretofore applying to New York city only, was likewise extended over the whole state. How far these protections are necessary

¹ *New York Times*, October 20, 1911, p. 3.

in rural communities may indeed be disputed, but their extension cannot be opposed on other grounds than those of expediency. But the provisions upon which some claim of virtuous purpose can be based were so few and of such minor importance that to justify the Levy law is to lose all sense of proportion. Should further illustration of the general character of the law and of its presumable motives be desired, the attention of the reader may be called to the following features: (*a*) the additional difficulties placed in the way of independent nominations by petition; (*b*) the new limitations upon the classes of persons who may be drawn upon as watchers and challengers to safeguard the honesty of registrations and elections in New York city; (*c*) the diversion of the activities of the special bureau charged with the duty of safeguarding elections in the metropolitan elections district (practically New York city) to the entire state; (*d*) the shortening, in New York city, of the period available for investigation of illegal registration, *i. e.* the period between registration and election; (*e*) a series of provisions tending to debase the electoral machinery itself, *viz.* provisions legislating out of office the commissioners of elections in New York city, heretofore appointed by the mayor, and vesting the appointment of their successors in the members of the board of aldermen, and provisions (probably) taking the employees of that commission out of the classified civil service and permitting the appointment as election officers without examination of persons who have served as election officers at any time in the past. The latter provision was the direct result of the determination of a new board of elections to have real examinations in the place of shams.

Still another provision of this law was designed to attach a special difficulty to the registration in 1911 of those up-state Republicans who did not vote in 1910. This provision has already suffered the same fate as the ballot provisions; it has been declared unconstitutional, although upon other grounds, *viz.* as in conflict with an express provision in the constitution relating to personal registration in rural communities.¹

A word may be added with respect to the view taken by the courts as to the appropriate time to raise the issues presented in

the Hopper case. The question was as to the form of the ballot in a coming election. The time for the preparation of the ballot had not yet arrived. The officers charged with this duty had not done anything illegal. It was to be presumed, however, that they would make up the ballot in conformity with the new law rather than with the old. It would be their duty so to make it up. It was not for them to decide that a statute was unconstitutional and to refuse to obey it. Under these circumstances the courts took a common-sense rather than a technical view of the situation. They recognized that it would be too late to take up the case when the time for printing the ballots arrived, that the issues were not contingent but actual, and that it would be proper to decide the case in advance.

The foregoing discussion has been confined to the form of ballot employed at the general or November elections. A similar question, however, has arisen in connection with the form of the primary ballot. The Primary Law Amendments² passed by the New York legislature of 1911 contain a restriction identical with that which was pronounced unconstitutional in the Hopper case, *viz.* that no name may appear in more than one place on a primary ballot. Inasmuch as the separate primary ballot of each party is to be arranged in the same manner as the general-election ballot, with separate columns for rival factions within the party, question is raised whether in this case also the provision that no name may appear in more than one column is not contrary to the principles of equality, and this law also has been attacked as unconstitutional. It will be of interest to see whether, in the judgment of the courts, the same considerations which led the Court of Appeals to condemn the ballot provisions of the Levy law do not apply to these primary-ballot provisions.³

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¹ Matter of Fraser *v.* Brown, 203 N. Y. 136.

² Laws 1911, ch. 891.

³ Since this article was put into type, Mr. Justice Bijur has held these and other provisions to be unconstitutional, including one permitting the appropriation of the party emblem by a single faction, *viz.* "the organization." Matter of Hopper and Hearst *v.* Britt, *N. Y. Law Journal*, January 10, 1912. An appeal is pending.